

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

DEAN PHILLIP HARRIS,

Plaintiff,

v.

CV. 07-1654-ST

DR. VARGO, HARDY MYERS, MD
STEVE SHELTON, DR. GARTH
GULLICK, JEAN HILL, JOHN and
JANE DOES,

FINDINGS AND RECOMMENDATION

Defendants.

STEWART, Magistrate Judge.

On November 2, 2007, petitioner filed a Petition for Writ of Habeas Corpus (docket #2) pursuant to 28 U.S.C. § 2254 in which he alleged that defendants were not providing him with adequate medical care within the Oregon Department of Corrections. This case was initially assigned to District Judge Garr M. King who, upon reviewing the contents of the Petition, ordered plaintiff to advise the court whether he intended to proceed with this action pursuant to 42 U.S.C. § 1983. Plaintiff responded to the Order,

and on February 8, 2008, filed an Amended Complaint utilizing a 42 U.S.C. § 1983 civil rights complaint form provided by the court.

On March 10, 2008, the case was reassigned Magistrate Judge Janice M. Stewart. The filing of plaintiff's Amended Complaint on the proper form prompted the court to send a Notice of Lawsuit and Request for Waiver of Service of Summons (docket #12) to counsel for defendants on March 12, 2008. The Clerk of Court purported to attach "a copy of the complaint" to the Notice of Lawsuit, but mistakenly attached the Petition for Writ of Habeas Corpus. As a result, it is the Petition for Writ of Habeas Corpus, not the Amended Complaint, which defendants now move to dismiss. Because the Petition for Writ of Habeas Corpus (docket #2) is not the operative pleading in this case, defendants' Motion to Dismiss should be denied.

RECOMMENDATION

Defendants' Motion to Dismiss (docket #19) should be DENIED on the basis that it does not apply to the operative pleading in this case.

SCHEDULING ORDER

Objections to these Findings and Recommendation(s), if any, are due October 9, 2008. If no objections are filed, then the Findings and Recommendation(s) will be referred to a district judge and go under advisement on that date.

If objections are filed, then the response is due within 10 days after being served with a copy of the objections. When the response is due or filed, whichever date is earlier, the Findings and Recommendation(s) will be referred to a district judge and go under advisement.

DATED this 22nd day of September, 2008.

/s/ Janice M. Stewart

Janice M. Stewart

United States Magistrate Judge